

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DIANA STEVER)	
Claimant)	
VS.)	
)	Docket No. 179,153
SUPERIOR INDUSTRIES, INT.)	
Respondent)	
Self-Insured)	

ORDER

Claimant appealed the Award dated October 24, 1997, entered by Administrative Law Judge Steven J. Howard. The Appeals Board heard oral argument on March 17, 1998.

APPEARANCES

Carlton W. Kennard of Pittsburg, Kansas, appeared for the claimant. John I. O'Connor of Pittsburg, Kansas, appeared for the respondent.

RECORD AND STIPULATIONS

In addition to the pleadings in the administrative file, the evidentiary record is comprised of the following:

1. Transcript of Preliminary Hearing, dated December 3, 1993.
2. Deposition of Diana Sue Stever, dated January 17, 1995.
3. Transcript of Regular Hearing, dated April 24, 1997.
4. Deposition of Jerry Dean Hardin, dated April 25, 1997.
5. Deposition of Dr. Revis C. Lewis, dated April 28, 1997.
6. Deposition of Dr. Dale E. Darnell, dated June 16, 1997.
7. Deposition of Dr. Michael G. Knapp, dated June 18, 1997.
8. Deposition of Larry Goodall, dated July 2, 1997.
9. Deposition of Robert M. Peters, dated July 2, 1997.
10. Deposition of Dr. Jeffrey Alan Greenberg, dated July 2, 1997.
11. Deposition of Dr. David O. King, dated July 23, 1997.
12. Deposition of Dr. Christopher Andrew, dated July 24, 1997.
13. Deposition of Paula Baker, dated July 25, 1997.
14. Deposition of Michael J. Dreiling, dated July 31, 1997.
15. Deposition of Tyge Sanborn, dated August 8, 1997.

16. Deposition of Dr. Kevin D. Komes, dated August 8, 1997.
17. Stipulation, dated August 8, 1997.

The parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits for an injury to the right arm. Claimant appealed that decision and contends she permanently injured both her right arm and shoulder. The only issue before the Appeals Board on this review is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

- (1) Superior Industries, Int., the respondent, manufactures aluminum wheels for the automotive industry. Superior hired Diana Stever, the claimant, as a fluoroscope operator. In that job, Ms. Stever would examine and inspect wheels with either a fluoroscope or x-ray machine, turn the wheels over for visual inspection, and then stamp and hang them on a tree. On a productive day, she would examine and handle 600 to 700 wheels.
- (2) In May 1993, Ms. Stever began to experience symptoms in her right arm, which she reported to her supervisor. She was then provided light duty work. The parties stipulated that Ms. Stever sustained personal injury by accident arising out of and in the course of her employment with Superior and they selected May 23, 1993, as the appropriate date of accident. The parties also agreed that the average weekly wage for this accident is \$459.74.
- (3) In June 1993, Ms. Stever began a period of conservative treatment for her wrist and shoulder pain. Commencing late May 1993, Ms. Stever was either off work or working under light duty restrictions until her last day of work for Superior in August 1993.
- (4) The last job Ms. Stever held with Superior was an accommodated position that required her to rubber stamp the wheels as they moved to her on a conveyor. On August 23, 1993, Ms. Stever left work before the end of her shift. Minutes after leaving work, she telephoned Superior's personnel manager, Larry Goodall, and told him she was having problems breathing and that she would shortly return to work after obtaining an inhaler. Despite her statements, Ms. Stever never returned.
- (5) From April 1, 1994, through May 18, 1994, Ms. Stever worked as a personal care aide for a mental health center. Later she obtained a job at Freeman Hospital. She testified she left those jobs because she was physically unable to perform them. But the mental health center's records indicate Ms. Stever was terminated for not showing up at work and not calling in. When she testified at the regular hearing in April 1997, Ms. Stever was performing bookkeeping and payroll on a part-time basis for her husband who owns and operates a truck rebuilding shop.

(6) At Superior's request, family practitioner Michael G. Knapp, D.O., saw Ms. Stever in June 1993 to evaluate and treat her pain complaints in the right arm and shoulder. He found muscle spasm in the cervical and thoracic spinal areas. The doctor last saw Ms. Stever in November 1993, at which time she had minimal findings. His final diagnosis was right elbow tendinitis. At their last visit, the doctor recommended additional physical therapy and a work hardening program. Based upon the second edition of the AMA Guides to the Evaluation of Permanent Impairment, he did not think Ms. Stever had a permanent functional impairment rating.

(7) Orthopedic surgeon David O. King, D.O., examined Ms. Stever at her attorney's request in July 1993. Based upon her complaints, which he said were limited to the right elbow down, the doctor diagnosed right lateral epicondylitis and forearm tendonitis. Because he did not know how she would recover, he did not attempt to rate her impairment.

(8) Board-certified neurological surgeon Jeffrey Alan Greenberg, M.D., saw Ms. Stever in May 1994 for a neurological examination. He did not find any neurological abnormality. But he did believe she had an orthopedic problem in the right shoulder and she needed to see an orthopedic specialist.

(9) Board-certified neurologist Christopher R. Andrew, M.D., examined Ms. Stever in May 1994 and ran an EMG to test the muscles and nerves in the right arm and shoulder. After his examination and tests, he concluded Ms. Stever had normal motor and sensory neurologic evaluations and normal range of motion in the neck and right upper extremity. He found no evidence of neurologic dysfunction as a cause for Ms. Stever's complaints.

(10) Board-certified neurosurgeon Revis C. Lewis, M.D., evaluated Ms. Stever at her attorney's request in August 1994. He recommended an MRI scan of the right shoulder and possible further consultation. He thought Ms. Stever had right elbow tendinitis and possibly rotator cuff syndrome or capsulitis in the right shoulder. He believes she has a 7 percent whole body permanent functional impairment rating according to an unidentified edition of the AMA Guides.

(11) The Administrative Law Judge ordered an independent medical evaluation by orthopedic surgeon Dale E. Darnell, M.D. He examined Ms. Stever's right upper extremity in June 1996. He believes Ms. Stever should avoid working with her right arm in an overhead position, avoid repetitive motion with her right shoulder, avoid right arm repetitive abduction and external rotation, and limit lifting above the waist to no greater than 10 to 15 pounds. Utilizing the AMA Guides, Fourth Edition, he believes she has a 5 percent whole body functional impairment for her right elbow and right shoulder conditions. But according to the AMA Guides, Third Edition, the doctor believes she would have no permanent impairment rating because he interprets that edition as providing no rating for pain.

(12) At Superior's request, board-certified physical medicine physician Kevin D. Komes, M.D., saw Ms. Stever in May 1997. After examining her and reviewing the results of a recent functional capacity evaluation, he recommended an MRI of the right shoulder and, if negative, a two-to four-week structured physical therapy program.

(13) After considering the entire record, the Appeals Board finds Ms. Stever sustained permanent injury and impairment to both her elbow and shoulder as a result of working for Superior. The Appeals Board is persuaded by Dr. Darnell's testimony that Ms. Stever has sustained a 5 percent whole body functional impairment.

(14) The Appeals Board finds Ms. Stever voluntarily terminated her employment with Superior after walking off an accommodated job that paid a wage comparable to what she was earning at the time her injury occurred.

CONCLUSIONS OF LAW

Because hers is an "unscheduled" injury, K.S.A. 1992 Supp. 44-510e governs the computation of permanent partial general disability:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by **competent medical evidence**. There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

That statute, however, must be interpreted in light of the principles set forth in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). The Foulk court held that workers could not refuse to perform an accommodated job within their medical restrictions that paid a comparable wage to avoid the presumption of no work disability quoted above.

Here, Ms. Stever left Superior's employment without justification and without putting forth a good faith effort to perform the accommodated job that the company had provided. Two physicians, Dr. King and Dr. Knapp, indicated the stamping job was within her medical restrictions. Based upon this record, the Appeals Board agrees.

The presumption of no work disability is applicable and Ms. Stever's permanent partial general disability benefits are limited to her whole body functional impairment rating of 5 percent.

Superior argued that the 5 percent rating could not be considered as it was based upon the fourth rather than third edition of the AMA Guides. That argument is without merit as the law in effect on the date of accident did not require the AMA Guides to be used.

Instead it required that the functional impairment be established by "competent medical evidence."

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Steven J. Howard dated October 24, 1997, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Diana Stever, and against the respondent, Superior Industries, Int., for an accidental injury which occurred May 23, 1993, and based upon an average weekly wage of \$459.74 for 4 weeks of temporary total disability compensation at the rate of \$299 per week or \$1,196, followed by 411 weeks at the rate of \$15.33 per week or \$6,300.63, for a 5% permanent partial general disability, making a total award of \$7,496.63.

As of April 15, 1998, there is due and owing claimant 4 weeks of temporary total disability compensation at the rate of \$299 per week or \$1,196, followed by 251.43 weeks of permanent partial disability compensation at the rate of \$15.33 per week in the sum of \$3,854.42 for a total of \$5,050.42, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$2,446.21 is to be paid for 159.57 weeks at the rate of \$15.33 per week, until fully paid or further order of the Director.

The Appeals Board hereby adopts remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of April 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Carlton W. Kennard, Pittsburg, KS
John I. O'Connor, Pittsburg, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director